Filed 5/17/07

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER HENDRIX TOWERS, Defendant and Appellant.	B188368 (Los Angeles County Super. Ct. No. NA058955) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [There is no change in judgment]

THE COURT:*

GOOD CAUSE appearing, the opinion filed in the above entitled matter on April 16, 2007, is modified as follows:

On page 13, after the last sentence of the first paragraph that ends "serious felony under section 1192.17, subdivision (c)(18)" insert the following paragraphs:

"Towers contends that there is no evidence linking the charges in the indictment for first degree burglary with his eventual second degree burglary conviction, and argues that we may not affirm based on the facts set forth in the indictment.[11] Towers bases this contention on decisions such as *People v. Jones* (1999) 75 Cal.App.4th 616 (*Jones*) and *People v. Rodriguez* (2004) 122 Cal.App.4th 121 (*Rodriguez*). In *Jones*, the prosecution

---

11 Towers does not dispute that an indictment is part of the record of conviction for purposes of determining the substance of his Tennessee conviction. (See *People v. McMahan* (1992) 3 Cal.App.4th 740, 745-746 [using facts of indictment to establish nature of foreign conviction].)

tried to prove a Three Strikes prior based on defendant's federal bank robbery conviction. The federal bank robbery statute (18 U.S.C., § 2113(a)) applied to either bank robbery by violence or force, both of which qualified as robbery under California law, or to entry of a bank in order to commit a larceny or any felony, which would not qualify as strike offenses. The records showed that the defendant pleaded guilty to a lesser included offense and the indictment did not establish the nature of his conduct, leading the *Jones* court to hold that there was insufficient evidence that the federal conviction qualified as a strike. (*Jones, supra,* 75 Cal.App.4th at pp. 633-635.)

In *Rodriguez*, the prosecution sought to prove that a Texas burglary qualified as a burglary conviction under California law for purposes of the Three Strikes law. Unlike California, under Texas law a burglary could occur even if a structure was not actually inhabited or used as a dwelling. (*Rodriguez, supra,* 122 Cal.App.4th at pp. 134-135.) In order to bridge this gap, the prosecution relied on an indictment that alleged the defendant entered the home of a specifically named person with the intent to deprive the owner of the owner's personal property. Because the indictment did not contain a case number or other information linking it to the actual conviction, the appellate court held that the indictment could not be used to show the facts of the defendant's Texas burglary conviction. (*Rodriguez, supra*, 122 Cal.App.4th at pp. 135-136.)

Jones and *Rodriguez* do not apply. First, unlike in *Jones*, the indictment does show Towers's conduct. Second, unlike in *Rodriguez,* Towers's first degree burglary indictment carries a case number – 89452 – and is listed in an October 1984 Tennessee prison document showing that Towers was being incarcerated following his conviction in four separate cases, including one bearing the same case number as the first degree burglary indictment. While we may not rely on Towers's prison records to establish the substance and facts underlying his conviction, we may use them to establish the fact that a conviction occurred. (Pen. Code, § 969b, subd. (a); *People v. Scott* (2000) 85 Cal.App.4th 905, 913-914, & fn. 13.) Those records show that he was convicted of second degree burglary in a case bearing the same number as the first degree burglary indictment. Because that indictment includes a precise factual description of his crime –

entering a home at night in order to steal the owner's possessions – and because a daytime or nighttime entry is the only statutory difference between second and first degree burglary in Tennessee, we hold that there was sufficient evidence to support a finding that Towers's second degree burglary conviction rested on the facts contained in the indictment. (*Rodriguez, supra,* 122 Cal.App.4th at p. 129 [substantial evidence standard applies to this determination, with record viewed in light most favorable to the trial court's findings].) A conviction on those facts qualifies as a strike under California law.

Towers also contends we should follow federal court decisions interpreting the Armed Career Criminal Act (ACCA) (18 U.S.C. §§ 922(g)(1), 924 (e)(1)), such as *Shepard v. United States* (2005) 544 U.S. 13 and *United States v. Snellenberger* (9th Cir. 2007) 480 F.3d 1187. While *Snellenberger* held that a charging document combined with only a minute order showing a guilty plea is not enough to determine the substance of a prior conviction under the ACCA (*Snellenberger, supra,* 480 F.3d at p. 1190), *Shepard* held that in determining whether a prior conviction based on a guilty plea fell within the ACCA, the courts should consider the charging document, a plea agreement or transcript of a colloquy with the judge where the underlying facts are confirmed, or other comparable judicial records. (*Shepard, supra,* 513 U.S. at p. 26.) Regardless of the correct interpretation of these or any other federal decisions under the ACCA, they raise questions of federal statutory interpretation that are not applicable here. (See *People v. Gonzales* (2005) 131 Cal.App.4th 767, 773-775.)"

On page 5, footnote 6, the second sentence that begins "Since the passage of Proposition 83 (Jessica's Law)" is replaced with the following:

"Effective September 20, 2006 (Stats. 2006, ch. 337 (S.B. 1128), however, section 667.5, subdivision (c)(5) has been amended to include all violations of section 288a, subdivision (c)."

On page 9, footnote 8, the second sentence that begins "This omission" is replaced with the following:

"This omission has apparently been corrected, however, by the Legislature's 2006 amendment of section 667.5, subdivision (c)(5), making all violations of section 288a, subdivision (c) violent felonies, not just those that were committed by force, violence, duress, etc."

On page 9, footnote 8, the third and fourth sentences, beginning with "Because all violations" and ending with "qualify as a serious felony" are deleted, and are replaced with the following:

"Respondent contends that this amendment applies to any crimes occurring on or after September 20, 2006. However, respondent does not contend that the amendment applies here, and we therefore need not resolve that issue."

No change in judgment.

Appellant's petition for rehearing is denied.

_____

COOPER, P. J. RUBIN, J. BOLAND, J.